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No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1932

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	3
Statutes involved	8
Summary of argument	8
Argument:	
I. No questions of law were raised by the record for consideration by the Circuit Court of Appeals	10
II. The present action is one for the recovery of taxes alleged to have been illegally exacted and is subject to the limitations applicable to such actions	12
III. Recovery of the tax sued for is barred by Section 3226 of the Revised Statutes, as amended	15
IV. The tax sued for can not be recovered since it was paid voluntarily prior to the enactment of the Revenue Act of 1924	21
V. Petitioner did not overpay its 1918 tax and therefore is not entitled to recover any portion thereof	25
Conclusion	35
Appendix	36–41

CITATIONS

Cases:

American Hide & Leather Co. v. *United States*, 284 U. S. 343 — 32, 33
Arnson v. *Murphy*, 109 U. S. 238; 115 U. S. 579 — 16
Atchison, T. & S. F. R. Co. v. *O'Connor*, 223 U. S. 280 — 22
B. Altman & Co. v. *United States*, 40 F. (2d) 781, certiorari denied, 282 U. S. 863 — 19, 20
Beatty v. *Heiner*, 10 F. (2d) 390, reversed on other grounds, 17 F. (2d) 743 — 24
Bonwit-Teller & Co. v. *United States*, 283 U. S. 258 — 12, 13, 17
Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 781 — 27
Bryant Paper Co. v. *Holden* (C. C. A. 6th), decided December 16, 1932 — 20
Burnet v. *Railway Equipment Co.*, 282 U. S. 295 — 27

Cases—Continued.

	Page
Campbell v. *Holt*, 115 U. S. 620	27
Champ Spring Co. v. *United States*, 47 F. (2d) 1, certiorari denied, 283 U. S. 852	28
Cheatham v. *United States*, 92 U. S. 85	16
Chesebrough v. *United States*, 192 U. S. 253	13, 22
Clift & Goodrich v. *United States*, 56 F. (2d) 751, certiorari denied October 10, 1932, No. 162, present term	23, 28
Coffey v. *Exchange Bank*, 296 Fed. 807	22
Coghlin Electric Co., Appeal of, 3 B. T. A. 1071	32, 33
Columbia River Packing Co. v. *Tallant*, 133 Fed. 990	14
Daube v. *United States*, 59 F. (2d) 842, 1 F. Supp. 771, now pending on petition for writ of certiorari, No. 634, present term	13, 26
De Arnaud v. *United States*, 151 U. S. 483	21
Falcone v. *Paradiso*, 60 App. D. C. 348	14
Farmers Loan & Trust Co. v. *United States*, 64 C. Cls. 516	24, 25
Finn v. *United States*, 123 U. S. 227	21
Fleischmann Co. v. *United States*, 270 U. S. 349	11
Fox v. *Edwards*, 280 Fed. 413	22
Fullerton Co. v. *Northern Pacific*, 266 U. S. 435	23
George Moore Ice Cream Co. v. *Rose*, (N. D. Ga.), decided Sept. 28, 1931, affirmed 61 F. (2d) 605, now pending on petition for writ of certiorari, No. 675, present term	23
Graham v. *Dupont*, 282 U. S. 234	16
Graham & Foster v. *Goodcell*, 282 U. S. 409	24, 25
Harrison v. *Lewellyn*, 28 F. (2d) 990, affirmed on other grounds, 35 F. (2d) 283	23
Hartwell Mills v. *Rose*, (C. C. A. 5th), decided November 3, 1932	15, 28
Ingram-Day Lumber Co. v. *McLouth*, 275 U. S. 471	11
John B. Semple & Co. v. *Lewellyn*, 1 F. (2d) 745, affirmed, 10 F. (2d) 1023	24
J. W. Carter Music Co. v. *Bass*, 20 F. (2d) 390	28
Leach v. *Nichols*, 42 F. (2d) 918, reversed on other grounds, 50 F. (2d) 787, 285 U. S. 165	25
Lewellyn v. *Electric Reduction Co.*, 275 U. S. 243	11
Lewis v. *Reynolds*, 284 U. S. 281, modified, 284 U. S. 599	14, 26, 27, 30, 34
Magee v. *United States*, 37 F. (2d) 763, affirmed on other grounds, 282 U. S. 422	26
Martinton v. *Fairbanks*, 112 U. S. 670	11, 12
Mascot Oil Co. v. *United States*, 42 F. (2d) 309, affirmed 282 U. S. 434	27
McCarl v. *United States ex rel Leland*, 42 F. (2d) 346, certeriorari denied, 282 U. S. 839	26
Moses v. *United States*, 61 F. (2d) 791	14, 17, 19, 20
Mueller Grain Co. v. *American State Bank of Omaha*, 275 U. S. 493	11

Cases—Continued.

	Page
Naumkeag Steam Cotton Co. v. *United States* (C. Cls.), decided January 9, 1933	20
New York Life Insurance Co. v. *Anderson*, 263 Fed. 527, certiorari denied, *Anderson* v. *United States*, 256 U. S. 696	28
Nutt v. *United States*, 125 U. S. 650	14
Oglesby Coal Co. v. *Commissioner*, 46 F. (2d) 617, certiorari denied, 284 U. S. 629	33
Parks & Woolson Machine Co. v. *United States*, 58 F. (2d) 768, certiorari denied October 17, 1932, No. 279, present term	18, 35
Patillo v. *Allen-West Commission Co.*, 108 Fed. 723	14
Pritchard v. *Norton*, 106 U. S. 124	25
Rasmussen v. *Brownfield-Carpet Co.*, 31 F. (2d) 89	23
Routzahn v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied October 24, 1932, No. 398, present term	14, 18
Sage v. *United States*, 250 U. S. 33	24
Stange v. *United States*, 282 U. S. 270	27
Stinson v. *Business Men's Accident Assn.*, 43 F. (2d) 312	11
Swift Co. v. *United States*, 111 U. S. 22	22
Tozaway Mills v. *United States*, 273 U. S. 781	27
Tucker v. *Alexander*, 275 U. S. 228	16, 21
Union Pacific Railroad Co. v. *Laramie Stock Yards Co.*, 231 U. S. 190	23
United States v. *Factors & Finance Co.*, No. 141, present term, decided Jan. 9, 1933	19
United States v. *Felt & Tarrant Co.*, 283 U. S. 267	16, 19
United States v. *John Barth Co.*, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370	27
United States v. *Kaufman*, 96 U. S. 567	13
United States v. *Mahoning Coal R. R. Co.*, 51 F. (2d) 208 certiorari denied, 285 U. S. 559	16
United States v. *Memphis Oil Co.*, No. 308, present term, decided January 9, 1933	14, 19, 20
United States v. *Michel*, 282 U. S. 656	16
United States v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488	22
United States v. *P. Lorillard Co.*, 267 U. S. 471	22
United States v. *Pacific Midway Oil Co.*, Prentice-Hall Fed. Tax Service (1932) Vol. 1, p. 551	28
United States v. *Henry Prentiss & Co.*, No. 234, present term, decided January 9, 1933	20
United States v. *Real Estate Savings Bank*, 104 U. S. 734	34
United States v. *Savings Bank*, 104 U. S. 728	13
United States v. *Smith*, 39 F. (2d) 851	11, 12
United States v. *St. Louis, S. F. & T. Ry. Co.*, 270 U. S. 1	22

Cases—Continued. Page

United States v. *Swift & Co.*, 282 U. S. 468 ..... 14, 26
United States v. *Whyell*, 28 F. (2d) 30, certiorari dismissed, 278 U. S. 664 27
Warner v. *Walsh*, 27 F. (2d) 952 23
Weed, Henry D., Appeal of, 2 B. T. A. 84 32
Weir v. *McGrath*, 6 Am. Fed. Tax Rep. 8005, affirmed without opinion, 41 F. (2d) 1021 25
William Danzer Co. v. *Gulf R. R.*, 268 U. S. 633 27
Wilmington Steamboat Co. v. *Sturgess*, 55 F. (2d) 831 ..... 11, 12
Wilson v. *Merchants' Loan & Trust Co.*, 183 U. S. 121 ..... 11, 12
Winant v. *Gardner*, 29 F. (2d) 836 23
Wright v. *Blakeslee*, 101 U. S. 174 22
Wright & Taylor v. *Lucas*, 34 F. (2d) 328, affirmed 45 F. (2d) 75, affirmed, 282 U. S. 409 27

Statutes:

Revised Statutes—
Sec. 649 (U. S. C. Sup. VI, Title 28, Sec. 773) 36
Sec. 700 (U. S. C. Title 28, Sec. 875) 36
Sec. 3226, as amended (U. S. C. App. Title 26, Sec. 156) 15, 36
Sec. 3228, as amended (U. S. C. App. Title 26, Sec. 157) 37
Revenue Act of 1918, c. 18, 40 Stat. 1057, 1061, 1075—
Sec. 205 (a) 38
Sec. 212 (b) 38
Sec. 226 39
Revenue Act of 1921, c. 136, 42 Stat. 227, 264, 268—
Sec. 250 (d) 40
Sec. 252 40
Revenue Act of 1928, c. 852, 45 Stat. 791, 874—
Sec. 607 (U. S. C. Sup. VI, Title 26, Sec. 2607) 41
Sec. 609 (U. S. C. Sup. VI, Title 26, Sec. 2609) 42
Sec. 608 (b) (2) (U. S. C. Sup. VI, Title 26, Sec. 2608) 21

Regulations:

Treasury Regulations No. 33 (Revised) Art. 211 32
Treasury Regulations No. 45—
Art. 25 32
Art. 431 32
Art. 1622 32
Art. 1624 32

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OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 56–59) is reported in 52 F. (2d) 885. The opinion of the Circuit Court of Appeals for the First Circuit (R. 63–70) is reported in 60 F. (2d) 97. Its opinion on motion for leave to reargue (R. 85–87) is reported in 61 F. (2d) 365.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1932. (R. 87.) A petition

for rehearing was denied August 5, 1932. (R. 88.) On October 24, 1932, the time within which petition for a writ of certiorari might be filed was extended to December 4, 1932, by an order of an Associate Justice of this Court. (R. 100.) Petition for a writ of certiorari was filed December 3, 1932, and granted January 9, 1933. (R. 100.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether under Sections 649 and 700 of the Revised Statutes, as amended, any question of law was raised by the record for consideration by the Circuit Court of Appeals.

2. Whether recovery of the tax sued for is barred by Section 3226 of the Revised Statutes, as amended.

3. Whether under Section 3226, as amended by the Revenue Act of 1924, taxes paid voluntarily in 1919 may be recovered in a suit brought in 1930.

4. Whether the petitioner overpaid its tax for the six months' period ending June 30, 1918. This involves the questions:

> (a) Whether after the approval in 1924 of a certificate of overassessment of 1918 taxes the Commissioner could in 1929 reaudit the 1918 tax to determine whether there had been an overpayment of such tax.

(b) Whether the record establishes that the computation of the tax made by the Commissioner in 1929 was erroneous.

(c) Whether the tax for the six months' period in question should be computed pursuant to Section 205 (a) or Section 226 of the Revenue Act of 1918.

STATEMENT

This is an action against two former Collectors of Internal Revenue to recover an alleged overpayment of income taxes for the first six months of 1918. (R. 3–8, 14.) Trial by jury was waived in writing. (R. 12, 15.) The trial court made no special findings of fact,[1] but the facts as stated in its opinion (R. 56–57) and as they appear elsewhere in the record may be summarized as follows:

Prior to 1918 the petitioner kept its books of account upon the basis of a fiscal year ending June 30th, but filed its income-tax returns upon the calendar year basis.[2] (R. 45, 65.) To conform to section 212 (b) of the Revenue Act of 1918, p. 38, *infra,* which required corporations keeping their books on a fiscal year basis to file their returns on that basis, the petitioner in March, 1919, filed a return for the first six months of 1918, on which return its tax for the six months' period was as-

[1] The petitioner made a request for findings of fact and rulings of law (R. 51–56), but no special findings were made or refused, nor were the requested rulings of law either made or refused. No exception to a refusal to make findings or to a refusal to rule as requested was taken in the course of the trial. (R. 21, 63–64.)

[2] See Article 211, Treasury Regulations No. 33 (Revised).

sessed at $302,438.83. (R. 65.) Although the record does not contain the details of this assessment, it was apparently computed pursuant to Section 226 of the Revenue Act of 1918. (R. 45, 50, 65–66.) The Commissioner of Internal Revenue abated $75,461.39 of this assessment (R. 6), and thereafter, some time in 1919, the petitioner voluntarily (R. 17, 66) paid the balance, $226,977.44, to the respondent Malley [3] (R. 15, 66).

On April 9, 1923, petitioner filed a combined claim for refund and credit of taxes alleged to have been illegally assessed for the six months' period ending June 30, 1918. (R. 46–49, 66.) By this claim petitioner sought the refund of $107,826.61 and credit against taxes for 1915, 1916, and 1917 of $48,563.39. (R. 46–47, 48, 66.) On May 7, 1923, the Commissioner determined that the correct tax for the first six months of 1918 was $146,098; that the original assessment was excessive in the amount of $156,340.83 (R. 23–26, 31, 66); and

[3] In September, 1919, petitioner filed an amended return showing income for the full fiscal year from June 30, 1917, to June 30, 1918, and took as the tax due for the first six months of 1918 the same proportionate part of the tax for the entire fiscal year, computed at the 1918 rates, as the portion of the fiscal year falling in 1918 was of the entire fiscal year. This return showed a resulting tax of $234,088.50. In October, 1920, petitioner filed a second amended return for the first six months of 1918, which return showed a tax due of only $127,651.08. (R. 54, 66.) What action, if any, the Commissioner took with respect to these returns does not appear. The petitioner states (Br. p. 12) that the Commissioner "accepted and approved" these returns. See footnote 11, p. 28, *infra*.

that therefore, after making allowance for the $75,461.39 previously abated, there had been an overpayment of taxes for the period in question of $80,879.44. This computation of the tax was apparently made under Section 205 (a) of the Revenue Act of 1918. (R. 24–26, 66.)

In December, 1923, the Commissioner issued his Schedule of Overassessments for the six months period ending June 30, 1918, showing the overpayment of $80,879.44. (R. 37.) Pursuant to this Schedule the respondent Nichols, who was then the Collector, on January 31, 1924, credited $74,648.39 to deficiencies for 1915, 1916, and 1917. (R. 15, 49.) On February 18, 1924, the Commissioner approved this action, and the balance of the $80,879.44 was either paid to or credited to other acknowledged tax liabilities of the petitioner. (R. 15, 37, 41, 57, 67.) The respondents conceded in the trial court that at the time the supposed 1918 overpayment was in part credited against deficiencies for prior years, the collection of such deficiencies was barred by the statute of limitations.[4] (R. 16, 20.)

On July 24, 1929, petitioner filed a claim for refund of that portion of the 1918 tax which had been applied as a credit against deficiencies for prior years, the claim being based upon Sections 607 and 609 of the Revenue Act of 1928. (R. 39–40.) On December 17, 1929, this claim was rejected

[4] See Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 264, p. 40, *infra*.

on the ground that the original overassessment had been erroneously allowed.[5] (R. 45–46, 49–50.)

No claim for refund of 1915, 1916, or 1917 taxes was filed by the petitioner.

The petitioner began the present suit by attachment on February 3, 1930 (R. 2) and filed its declaration on March 26, 1930 (R. 3–15). Count I of the declaration, which applied to the two respondents jointly and severally, set forth the substance of the foregoing facts, and alleged that "the defendants or either of them owes it" $74,648.39. Count II was against the respondent Malley for money had and received, and Count III was a like declaration against Nichols. (R. 8.) Both respondents answered by way of a general denial.[6]

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[5] In the petition for certiorari (p. 4) petitioner asserts that the Commissioner repudiated his original determination " solely to avoid the effect of Section 609 of the Act of 1928." This statement is without support in the record. The petition also asserts (p. 5) that at the trial counsel for respondents admitted in open court " that the previous determination or allowance of the overpayment was right," and (p. 6) that on the hearing in the Circuit Court of Appeals " Counsel for the Government again admitted in open Court (1) that the Commissioner's determination of May 7, 1923, was right." There is no support for these statements in the record (R. 16, 80–81), and the attorney who argued the case for the respondents denies that such an admission was made. See footnote 14, p. 34, *infra*.

[6] Each respondent filed a motion to compel the petitioner to elect against which of the respondents it would proceed. (R. 10–11, 15.) The petitioner filed a motion for further particulars as to the nature of the defenses to be relied upon. (R. 12–14.) The respondents' motions were overruled but no specific ruling was made on petitioner's motion. (R. 15, 63.)

(R. 9–10, 15.) The District Court gave judgment for the respondents on the ground that under Sections 607 and 609 of the Revenue Act of 1928 the credit of the portion of the alleged 1918 overpayment against the barred taxes for prior years was not void, and that no refund thereof could be made. (R. 56–59.)

Upon appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 87–88.) Although holding that no question was raised on the record for the consideration of the court by petitioner's assignments of error (R. 64–65), the Circuit Court of Appeals expressed the opinion that the determination of petitioner's taxes for the first six months of 1918 was governed by Section 226 rather than by Section 205 (a) of the Revenue Act of 1918; that, so far as the record disclosed, the Commissioner's original assessment, made under Section 226, was correct; that the certificate of overassessment had been erroneously issued; that there was no overpayment of 1918 taxes; and that the Government was not in possession of any money justly belonging to the petitioner. (R. 65–70.) Thereafter the court denied a petition for rehearing (R. 88) and a motion for leave to argue orally on the question of the proper method of computing the taxes (R. 99).

In its petition for certiorari (pp. 2–3) and brief on the merits (p. 25) petitioner concedes that it has no cause of action against the respondent Nichols.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 36–41.

SUMMARY OF ARGUMENT

I

Because of petitioner's failure to secure from the trial court special findings of fact or rulings upon propositions of law, duly excepted to and preserved by bill of exceptions, no questions of law were presented by the record for consideration by the court below.

II

There is no distinction between an action for money had and received based upon an overpayment of taxes and an action to recover taxes illegally exacted, and the present action is subject to the limitations applicable to such latter action.

III

Recovery of the tax sued for is barred by Section 3226, R. S., as amended, since suit was not brought within five years of the payment of the tax nor within two years after disallowance of a timely claim for refund. Although the first claim for refund was timely, that claim was allowed. The second claim was filed too late. The instant case is not affected by the recent decision of this Court in *United States* v. *Memphis Oil Co.*, decided January

9, 1933, since it raises no question as to an insufficient claim which, by amendment after the statute has run, is made sufficient prior to final action thereon by the Commissioner.

IV

The tax sued for may not be recovered since it was paid voluntarily prior to the Revenue Act of 1924. The instant action does not fall within Section 1014 (a) of that Act, which amended Section 3226, R. S., so as to permit suits to be maintained whether or not the tax was paid under protest, since Section 1014 (a) may not be given a retroactive application so as to impose a personal liability upon a Collector for an act which gave rise to no liability at the time of the act.

V

Petitioner did not overpay its 1918 tax and therefore is not entitled to recover any portion thereof. Although the Commissioner in 1924 approved a certificate of overassessment showing an overpayment of 1918 taxes, by a subsequent computation of the tax in 1929 he determined that the certificate of overassessment was erroneous and that there had been no overpayment. In the absence of evidence to the contrary, the Court must presume the Commissioner's final computation of the tax to be correct.

ARGUMENT

I

NO QUESTIONS OF LAW WERE RAISED BY THE RECORD FOR CONSIDERATION BY THE CIRCUIT COURT OF APPEALS

Trial by jury was waived in writing (R. 12, 15) and the case tried by the District Judge. Although the petitioner filed a request for findings of fact and rulings of law (R. 51–56), no special findings were made or refused, nor were the requested rulings of law either made or refused. No exception to a refusal to make findings or to a refusal to rule as requested, nor any exceptions to any rulings of law were taken by the petitioner during the course of the trial, and duly preserved by a bill of exceptions. (R. 21, 63–64.) No questions of law favorable to the petitioner were raised by the pleadings. (R. 3–10.) Each of the assignments of error (R. 60–61) related either to matters of fact or to conclusions of law embodied in the opinion of the trial judge (R. 56–59).

Although the Circuit Court of Appeals expressly recognized the foregoing facts (R. 63–65) it proceeded to pass upon the merits of the case. We think the court should have dismissed the appeal on the ground that the record raised no questions of law, with respect to the merits of the case, for its consideration. It has been repeatedly held under Sections 649 and 700 of the Revised Statutes, as amended, p. 36, *infra*, that—

> in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. * * * To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. * * * *Fleischmann Co.* v. *United States,* 270 U. S. 349, 355 *et seq.*

See *Mueller Grain Company* v. *American State Bank of Omaha,* 275 U. S. 493; *Ingram-Day Lumber Co.* v. *McLouth,* 275 U. S. 471, 474; *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, 248; *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S. 121, 127; *Martinton* v. *Fairbanks,* 112 U. S. 670. See also *Wilmington Steamboat Co.* v. *Sturgess,* 55 F. (2d) 831, 832–833 (C. C. A. 3d); *Stinson* v. *Business Men's Accident Ass'n.,* 43 F. (2d) 312, 314 (C. C. A. 10th); *United States* v. *Smith,* 39 F. (2d) 851 (C. C. A. 1st).

It is true that after the entry of the judgment and opinion of the trial court exceptions were taken to alleged rulings of the court (R. 21–22), but clearly such exceptions were not to rulings "in the course of the trial." *Wilson* v. *Merchants' Loan &*

Trust Co., 183 U. S. 121, 127, *supra*; *Martinton* v. *Fairbanks*, 112 U. S. 670, 673, *supra*; *United States* v. *Smith*, 39 F. (2d) 851, 854 (C. C. A. 1st), *supra*.

II

THE PRESENT ACTION IS ONE FOR THE RECOVERY OF TAXES ALLEGED TO HAVE BEEN ILLEGALLY EXACTED AND IS SUBJECT TO THE LIMITATIONS APPLICABLE TO SUCH ACTIONS

In its petition for certiorari (pp. 23–24) petitioner stated with respect to *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, that—

> While there the suit was actually brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the *same suit might not have been brought against the Collector* for "money had and received" as "evidenced by" the Certificate of Overassessment. (Italics ours.)

This statement would seem to indicate that petitioner intended to argue in this Court that recovery of the amount sued for could be had against former Collector Malley in a suit brought in a District Court on an account stated—based upon the certificate of overassessment. But in its brief on the merits petitioner apparently concedes that such a suit can be brought only in the Court of Claims *against the United States*, and states that its right to recover upon Count II of the declaration is not *upon an account stated*, but is for money had and received as "evidenced by the Certificate of Overassessment." (Br. pp. 25, 30–31.)

This alleged basis of recovery is discussed by petitioner, as though it were an alternative cause or theory of action. Thus, recovery of the sum in question is sought (Pet. Br. p. 4.)—

> either (1) as *1918 taxes wrongfully collected and credited,* as alleged in Count I of the plaintiff's declaration * * * or (2) as *"money had and received" by the defendant Malley,* as alleged in Count II of the plaintiff's declaration * * *.

But if, as petitioner now concedes, neither Count I nor Count II be deemed to involve an action upon an account stated,[7] we believe that Counts I and II,

[7] While petitioner's present theory of the case seems to require no consideration of the question, we desire to make clear our position that no action is maintainable against a Collector upon a certificate of overassessment on the theory of an account stated.

Assuming that an action against *the United States* as upon an account stated would, upon the facts of this case, be maintainable (Cf. *Daube* v. *United States*, 59 F. (2d) 842, 1 F. Supp. 771, (C. Cls.), now pending on petition for writ of certiorari, No. 634, present term) if instituted in time, it is clear that recovery can not be had against the respondent Malley upon that theory. As the court below observed, he had nothing to do with the issuance of the certificate of overassessment, nor was he privy to any promise therein contained, either express or implied, to refund an overpayment. The action upon the certificate of overassessment is founded upon an implied promise to pay, made by the party acknowledging the indebtedness stated in the account. *United States* v. *Kaufman*, 96 U. S. 567, 570; *United States* v. *Savings Bank*, 104 U. S. 728, 733; *Chesebrough* v. *United States*, 192 U. S. 253, 263; *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, 265. The implied promise of the Commissioner

though pleaded alternatively, are in fact indistinguishable. The allegation that the respondent Malley has received and possesses money to which petitioner is rightfully entitled, depends for proof upon a showing that Malley wrongfully collected a tax from petitioner. Sec. 3226, R. S., p. 36 *infra*, prescribes the only permissible procedure "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * *," and as this Court pointed out in *Lewis* v. *Reynolds*, 284 U. S. 281, 283, "The action to recover on a claim for refund is in the nature of an action for money had and received." See also *United States* v. *Memphis Oil Co.*, No. 308, present term, decided January 9, 1933; *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, 917 (C. C. A. 6th), certiorari denied, October 24, 1932, No. 398, present

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plainly does not serve to bind Malley, or to fasten on him a personal liability to pay a refund, the validity of which he has not acknowledged and against which he has valid defenses. *Moses* v. *United States*, 61 F. (2d) 791, 793 (C. C. A. 2d). Cf. *United States* v. *Swift & Co.*, 282 U. S. 468, 474–475. Agreement between the parties is the essence of an account stated, and an action founded on such an account is based not upon the original liability, but upon the new promise to pay the agreed amount of liability. See *Nutt* v. *United States*, 125 U. S. 650, 655; *Falcone* v. *Paradiso*, 60 App. D. C. 348, 350; *Columbia River Packing Co.* v. *Tallant*, 133 Fed. 990, 995 (C. C. D. Ore.); *Patillo* v. *Allen-West Commission Company*, 108 Fed. 723, 726 (C. C. A. 8th). In the instant case there was obviously no agreement between petitioner and Malley, and no promise on Malley's part to pay an acknowledged and ascertained indebtedness.

term; *Hartwell Mills* v. *Rose* (C. C. A. 5th), decided November 3, 1932.

While it may be conceded that the theory upon which an action for recovery of taxes is permitted against a Collector is that he improperly retains funds belonging to another, and that the action is therefore basically similar to an ordinary contract action for money had and received, we submit that no action for money had and received based upon an overpayment of taxes will lie against a Collector independently of the action to recover a tax illegally or erroneously collected. Accordingly, in order to succeed in the present suit, petitioner must show compliance with all the requirements prescribed for the maintenance of a suit to recover a tax.

III

RECOVERY OF THE TAX SUED FOR IS BARRED BY SECTION 3226 OF THE REVISED STATUTES, AS AMENDED

Section 3226 of the Revised Statutes, as amended,[8] (U. S. C., Title 26, Sec. 156) pp. 36, 37, *infra,* provides that no suit for the recovery of taxes erroneously assessed or collected shall be maintained in any court "until a claim for refund or credit has been duly filed with the Commissioner of Internal

[8] This section was further amended by Section 1103 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286 (U. S. C., Sup. VI, Title 26, Sec. 156), but by Section 1103 (b) of that Act suits instituted before the effective date of the Act are not affected by the amendments contained in Section 1103 (a).

Revenue, according to the provisions of law in that regard," and that *no such suit shall be begun*—

> after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

From an early date it has been recognized that actions against Collectors to recover taxes paid are statutory proceedings (*Arnson* v. *Murphy,* 109 U. S. 238, 243; 115 U. S. 579, 584), and that the Federal statutes provide an exclusive method or system by which Federal taxes illegally exacted may be recovered (*Graham* v. *Dupont,* 262 U. S. 234, 255). The particular statute here in question is one of long standing, and the courts have interpreted it to require strict compliance with the conditions laid down for recovery. *Cheatham* v. *United States,* 92 U. S. 85; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 272–273. In commenting upon the statute in *Tucker* v. *Alexander,* 275 U. S. 228, 231, the Court said:

> Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States.

See also *United States* v. *Michel,* 282 U. S. 656, 658; *United States* v. *Mahoning Coal R. R. Co.,*

51 F. (2d) 208 (C. C. A. 6th), certiorari denied, 285 U. S. 559.

The instant suit does not meet the statutory requirements. Although the taxes were paid in 1919 (R. 15, 66), the suit was not begun until 1930. It thus was not brought within five years of payment.

Nor does the action fall within the provision permitting suit within two years after disallowance of a claim for refund. The only *timely* claim for refund in the instant case, that of April 9, 1923, was *allowed* in 1924. (See pp. 4–5, *supra*.) The statute does not authorize the filing of a suit upon the allowance of a taxpayer's claim for refund. As the court said in *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, 265:

> This case is not within the clause giving two years after disallowance, because here the claim was allowed.

If the fact that the Commissioner credited a greater amount of the alleged overpayment of 1918 taxes to unpaid taxes for prior years than petitioner requested to be so credited be construed as a rejection of the claim, then suit had to be brought within two years thereafter. Cf. *Moses* v. *United States*, 61 F. (2d) 791, 795 (C. C. A. 2d). Clearly, a suit in 1930 did not meet the requirements of the statute.[9]

Petitioner contends that by the claim for refund filed on July 24, 1929 (R. 39–40), it reasserted its

[9] The petitioner's case is not helped even if the credit in 1924 of the alleged overpayment of 1918 taxes to the unpaid deficiencies for 1915, 1916, and 1917 be regarded as a pay-

claim filed on April 9, 1923; that thereafter, in December, 1929, its claim was for the first time disallowed; and that the present suit was brought within two years of such disallowance, so that the suit meets the requirements of Section 3226, R. S. This argument, though ingenuous, is, we think, unfounded.

The claim of April 9, 1923 (R. 46–47, 48, 66), was predicated upon an alleged overpayment of 1918 taxes. The claim of July 24, 1929 (R. 39–40), was based upon a void credit of a supposed overpayment of 1918 taxes to barred deficiencies for prior years. The second claim did not concern itself with the subject matter of the first claim, i. e., the amount of taxes properly owing for the first six months of 1918. The second claim *assumed* that the Commissioner in allowing the first claim, had properly computed the taxes, but complained that the overpayment had been erroneously disposed of—although to a large extent the disposition was made at the request of petitioner. If the second claim be regarded as a new and distinct claim, as we think it must be, it was untimely and barred by the statute, since it was filed more than four years after the payment of the tax. See Section 3228, R. S.,

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ment of taxes for the prior years (see *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, 917 (C. C. A., 6th), certiorari denied October 24, 1932, No. 398, present term; but cf. *Parks & Woolson Machine Co.* v. *United States*, 58 F. (2d) 768 (C. Cls.), certiorari denied October 17, 1932, No. 279, present term), since the instant suit was brought "more than five years after such payment." Moreover, petitioner filed no claim for refund of 1915, 1916, and 1917 taxes.

as amended, p. 37, *infra*. Clearly no action can be based upon the denial of an invalid claim for refund. See *Moses* v. *United States*, 61 F. (2d) 791, 794 (C. C. A. 2d); cf. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269.

But petitioner contends that the second claim for refund was not a fresh claim but merely a reassertion of the original claim, and that, therefore, the disallowance of the second claim was really the disallowance *pro tanto* of the first claim. This contention would seem to be adequately answered by the Circuit Court of Appeals when it said (R. 68):

> a claim for refund barred by the statute can not be revived by filing a new claim and basing an action on its denial.

In closely similar circumstances it has been held that where a second refund claim is filed almost four years after rejection of the first claim, such latter claim, raising no new issue and involving no new assessment, does not operate to save the rights of the taxpayer which had been barred by Section 3226, R. S. *B. Altman & Co.* v. *United States*, 40 F. (2d) 781 (C. Cls.), certiorari denied, 282 U. S. 863.

Petitioner seems to place some reliance upon *United States* v. *Memphis Oil Co.*, No. 308, present term, decided January 9, 1933. That case held that "a general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval." See *United States* v. *Factors & Finance*

Co., and *United States* v. *Henry Prentiss & Co.*, respectively, Nos. 141 and 234, present term, decided January 9, 1933. Unlike the *Memphis Oil Co.* case, the instant case raises no question as to an insufficient claim which, by amendment after the statute has run, is made sufficient prior to final action thereon by the Commissioner. Here the original claim for refund was regular in form and substance and met all the requirements of the statute. Moreover, contrary to the situation in the *Memphis Oil Co.* case, it was promptly and formally acted upon by the Commissioner, and the action of the Commissioner was not questioned by petitioner for nearly six years. Cf. *Moses* v. *United States,* 61 F. (2d) 791, 795 (C. C. A. 2d); *Naumkeag Steam Cotton Co.* v. *United States* (C. Cls.), decided January 9, 1933; *Bryant Paper Co.* v. *Holden,* (C. C. A. 6th), decided December 16, 1932.

If it is too late to reopen the question of the tax liability by amendment or otherwise after the claim has been finally rejected (*United States* v. *Memphis Oil Co., supra*), *a fortiori* it would seem too late to reopen that question after a claim has been formally acted upon and allowed. In the *Altman case, supra,* the Court of Claims said (p. 784):

> Section 3226, Revised Statutes, manifestly does not contemplate the repetition of contentions for refund in such a way and at such times as to toll the running of the limitation period. The purpose of limiting suits to recover alleged illegal tax exactions is

> evident, and if plaintiff by repeating its contentions in two refund claims may establish jurisdiction to sue, despite the limitation prescribed in the law, litigation would be prolonged indefinitely. *The act of the Commissioner in rejecting the second refund claim is without legal significance, for when it was filed and afterwards rejected plaintiff's right to sue had lapsed by limitation.* (Italics ours.)

It may be suggested, although petitioner does not specifically so argue, that although the second claim was untimely, the Commissioner did accept it, pass upon it, and formally reject it, and that thereby the Government waived its right to insist that the claim was filed too late. But it is well settled that no officer of the Government has authority, apart from statute, to waive a statute of limitations upon suits against the United States and its officers. *Finn* v. *United States,* 123 U. S. 227, 233; *De Arnaud* v. *United States,* 151 U. S. 483, 495–496. While certain conditions in connection with claims for refund may be waived by the Commissioner, the statute of limitations is not such a condition. *Tucker* v. *Alexander,* 275 U. S. 228, 231–232. Cf. Section 608 (b) (2) of the Revenue Act of 1928, c, 852, 45 Stat. 791, 874.

IV

THE TAX SUED FOR CAN NOT BE RECOVERED SINCE IT WAS PAID VOLUNTARILY PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1924

The 1918 tax was paid voluntarily (R. 17, 66) some time in 1919 (R. 15, 66). Prior to the Reve-

nue Act of 1924 it was the settled rule in the Federal courts that there could be no recovery of a tax erroneously paid or illegally enacted unless it had been paid under duress or protest. This was true whether the suit was against the United States or against a Collector. See *Atchison T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280; *United States* v. *New York & Cuba Mail S. S. Co.,* 200 U. S. 488; *Chesebrough* v. *United States,* 192 U. S. 253; *Swift Co.* v. *United States,* 111 U. S. 22; *Wright* v. *Blakeslee,* 101 U. S. 174, 179; *Fox* v. *Edwards,* 280 Fed. 413 (S. D. N. Y.); *Coffey* v. *Exchange Bank,* 296 Fed. 807 (C. C. A. 8th); cf. *United States* v. *P. Lorillard Co.,* 267 U. S. 471, 474.

In 1924 Section 3226 of the Revised Statutes, which sets forth the requisites for a suit or proceeding "in any court" to recover taxes illegally assessed or collected, was amended by Section 1014 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, p. 37, *infra,* which, for the first time, provided that suit might be maintained "whether or not such tax, penalty, or sum has been paid under protest or duress." This section was reenacted as Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and is still in force. We contend that the 1924 amendment did not raise the bar against suits brought to collect taxes which were voluntarily paid prior to its enactment.

In *United States* v. *St. Louis, S. F. & T. Ry. Co.,* 270 U. S. 1, 3, this Court said:

> That a statute shall not be given a retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application.

See also *Union Pacific Railroad Company* v. *Laramie Stock Yards Company,* 231 U. S. 190, 199; *Fullerton Co.* v. *Northern Pacific,* 266 U. S. 435.

Pursuant to the foregoing rule of construction it was held in *Warner* v. *Walsh,* 27 F. (2d) 952 (D. Conn.), that the 1924 amendment of Sec. 3226, R. S. was prospective only, and that it was limited not only to suits begun after its passage but also to suits begun as a result of transactions arising after its passage and to payments made for sums collected thereafter. The same result was reached in *Harrison* v. *Lewellyn,* 28 F. (2d) 990 (W. D. Pa.), affirmed on other grounds, 35 F. (2d) 283 (C. C. A. 3d), and in *George Moore Ice Cream Co.* v. *Rose* (N. D. Ga.), decided September 28, 1931, affirmed, 61 F. (2d) 605 (C. C. A. 5th), now pending on petition for a writ of certiorari, No. 675, present term. See also *Rasmussen* v. *Brownfield-Carpet Co.,* 31 F. (2d) 89 (C. C. A. 9th). Cf. *Winant* v. *Gardner,* 29 F. (2d) 836 (C. C. A. 2d). In *Clift & Goodrich* v. *United States,* 56 F. (2d) 751 (C. C. A. 2d), certiorari denied, October 10, 1932, No. 162, October Term, 1932, it was held that the 1924 amendment did not enlarge the Government's liability where payment of taxes had not only been voluntary but had been made with full knowledge

of the facts; in that case payment had been made before 1924 and a suit instituted thereafter.

An action against a Collector to recover taxes paid to him is a personal one, and in some circumstances personal execution may issue against him. See *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430; *Sage* v. *United States,* 250 U. S. 33. Prior to the amendment of Sec. 3226, R. S. in 1924 it was, of course, a personal defense to a suit against a Collector that the payment had been voluntarily made. (See *John B. Semple & Co.* v. *Lewellyn,* 1 F. (2d) 745, 748 (W. D. Pa.), affirmed 10 F. (2d) 1023 (C. C. A. 3d), and cases cited *supra.*) Accordingly, if the 1924 amendment be given a retroactive operation the effect will be to impose a personal liability upon a Collector where none existed at the time he acted. In the instant case the Collector from whom petitioner seeks to recover is no longer in office, and the transaction for which petitioner insists he is accountable occurred several years before the 1924 amendment. Thus, if petitioner's contention were sustained, conduct entailing no personal liability at the time would be rendered perilous after the event, and an unsuspected liability would be imposed upon an individual who would otherwise have a valid defense.

It is true that certain courts have given the 1924 amendment a retroactive application. *Farmers Loan & Trust Co.* v. *United States,* 64 C. Cls. 516; *Beatty* v. *Heiner,* 10 F. (2d) 390, 392 (W. D. Pa.),

reversed on other grounds, 17 F. (2d) 743. See also *Leach* v. *Nichols,* 42 F. (2d) 918, 921 (D. Mass.), reversed on other grounds, 50 F. (2d) 787 (C. C. A. 1st), 285 U. S. 165; *Weir* v. *McGrath,* 6 Am. Fed. Tax Rep. 8005, 8006 (S. D. Ohio), affirmed without opinion, 41 F. (2d) 1021 (C. C. A. 6th). In none of these cases does the question seem to have been given careful consideration, and we think that they are against the weight of the authority and the better reasoned view. It should be noted that in the *Farmers Loan and Trust Co. case, supra,* the suit was against the *United States.* It is arguable that Congress might validly surrender a defense theretofore available to the Government, but it is extremely doubtful if within constitutional limitations it could destroy individual defenses which had already vested, especially where the effect of such action would be to impose a personal liability upon a Collector after he had left office for an act which gave rise to no liability at the time of the act. See *Pritchard* v. *Norton,* 106 U. S. 124, 132; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 426, and cases there cited in footnote 14.

V

PETITIONER DID NOT OVERPAY ITS 1918 TAX AND THEREFORE IS NOT ENTITLED TO RECOVER ANY PORTION THEREOF

If, as held by the Circuit Court of Appeals (R. 69–70), the record does not show that petitioner overpaid its 1918 tax, it is not entitled to recover

any part thereof. In *Lewis* v. *Reynolds,* 284 U. S. 281, this Court said (p. 283):

> *An overpayment must appear before refund is authorized.* Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded. (Italics ours.)

See also *United States* v. *Swift,* 282 U. S. 468, 472; *McCarl* v. *United States ex rel. Leland,* 42 F. (2d) 346 (App. D. C.), certiorari denied, 282 U. S. 839; *Magee* v. *United States,* 37 F. (2d) 763 (C. Cls.), affirmed on other grounds, 282 U. S. 422; *Daube* v. *United States,* 59 F. (2d) 842 (C. Cls.), 1 F. Supp. 771, now pending on petition for a writ of certiorari, No. 634, present term.

In the *Leland case, supra,* the Commissioner had notified the taxpayer of a deficiency for 1918 and an overassessment for 1919. The taxpayer challenged the ruling as to the deficiency by appeal to the Board of Tax Appeals, and while the appeal was pending brought suit to recover the amount of the overassessment. Recovery was denied on the ground that a taxpayer was entitled to a refund of overpayments "only in the event of a net balance in favor of the taxpayer," and that it could not be known until final determination of the amount of tax for 1918 whether such a net balance existed.

No difficulty arises from the fact that the Commissioner did not determine that petitioner had not overpaid its 1918 tax until after the assessment and collection of such tax was barred by the statute of limitations. The running of the statute does not extinguish the debt due from the taxpayer, but merely abrogates the remedy. See *United States* v. *Whyel*, 28 F. (2d) 30 (C. C. A. 3d), certiorari dismissed, 278 U. S. 664; *Wright & Taylor* v. *Lucas*, 34 F. (2d) 328 (W. D. Ky.), affirmed, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309 (C. Cls.), affirmed, 282 U. S. 434; *United States* v. *John Barth Co.*, 27 F. (2d) 782 (C. C. A. 7th), reversed on other grounds, 279 U. S. 370. These decisions follow the rule as to debts in general in the absence of a contrary intent disclosed by the statute.[10] *Campbell* v. *Holt*, 115 U. S. 620; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633.

The conclusion for which we contend follows, because in an action for money had and received to recover taxes paid the taxpayer is not entitled to recover unless he establishes that the Government retains money which in equity belongs to the taxpayer. *Lewis* v. *Reynolds*, 284 U. S.

[10] The principle that the statute of limitations merely bars the remedy without extinguishing the liability is emphasized by *Stange* v. *United States*, 282 U. S. 270, and *Burnet* v. *Railway Equipment Co.*, 282 U. S. 295, holding that a waiver given after the expiration of the statute is a valid waiver. Cf. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Toxaway Mills* v. *United States*, 273 U. S. 781.

281, *supra; Champ Spring Co.* v. *United States,* 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Hartwell Mills* v. *Rose* (C. C. A. 5th), decided November 3, 1932; *Clift & Goodrich* v. *United States,* 56 F. (2d) 751 (C. C. A. 2d), certiorari denied October 10, 1932, No. 162, present term. See also *J. W. Carter Music Co.* v. *Bass,* 20 F. (2d) 390 (S. D. Tex.); *New York Life Ins. Co.* v. *Anderson,* 263 Fed. 527 (C. C. A. 2d), certiorari denied, *Anderson* v. *United States,* 256 U. S. 696; *United States* v. *Pacific Midway Oil Co.* (N. D. Cal.), decided December 31, 1931.

Petitioner's tax for the six months ending June 30, 1918, as based upon its original return for that period,[11] was originally assessed at $302,438.83 (R. 31, 65). Neither this return nor the details of the original assessment are in the record, but it seems that this assessment was made pursuant to Section 226 of the Revenue Act of 1918. (R. 45–50, 63–66.) Thereafter the Commissioner abated $75,461.39 of this assessment, and the balance of the tax,

[11] Petitioner asserts (Br. p. 12) that its *original* 1918 return was not for the six months period ending June 30, 1918, but for the entire fiscal year ending on that date. There is no support in the record for this statement. It is negatived by petitioner's claim for refund (R. 47) and the Commissioner's letter of December 17, 1929 (R. 49–50). The court below found to the contrary. (R. 65.) We are advised by the Bureau of Internal Revenue that an inspection of their files discloses that the first return filed by petitioner for 1918 was for the first six months of that year. Its first *amended* return was for the entire fiscal year. (R. 66; p. 4, *supra.*)

$226,977.44, was paid by petitioner in 1919. (R. 15, 17, 66.) On April 9, 1923, petitioner filed a claim for refund and credit of taxes for the first six months of 1918. (R. 46–47, 48, 66.) On May 7, 1923, the Commissioner determined that the correct tax for the six months' period was $146,098.00; that the original assessment was excessive in the amount of $156,340.83; and that after allowing for the $75,461.39 previously abated, there was an overpayment of $80,879.44. Apparently this computation of the tax was made under Section 205 (a) of the Revenue Act of 1918. (R. 23, 26, 31, 66.)

After petitioner had filed its second claim for refund, on July 24, 1929 (R. 39–40) the Commissioner recomputed petitioner's tax for the six months period in question and on December 17, 1929, advised petitioner that its correct tax was $302,438.83, the amount originally assessed; that the computation made in 1923, which produced the overassessment of $156,340.83, was erroneous; that the proper method of computing the tax was in accordance "with the original return which you filed" and pursuant to Section 226 of the 1918 Act. (R. 45–46, 49–50, 69.)

It thus appears that upon a reaudit of petitioner's tax liability, consequent to the second claim for refund, the Commissioner determined that the computation of 1923 was erroneous, and that petitioner had not overpaid its 1918 taxes. This conclusion was made the basis of the rejection of the

second claim for refund. Unless the record establishes that the Commissioner's last computation was erroneous there can be no recovery of 1918 taxes, under *Lewis* v. *Reynolds, supra,* no matter to what use, by way of an attempted credit or otherwise, they were put by the Commissioner.

The details of the Commissioner's 1929 computation of the tax are not in the record. It does appear that the computation was made in accordance with petitioner's original return (R. 49–50), but this return is not in the record. Whether the items of gross income, invested capital, and deductions as shown on the original return were the same as those used in the 1923 computation (see R. 24–26) does not appear. In the absence of evidence to the contrary, we submit that the Court must presume the Commissioner's last computation to be correct.

It seems reasonably clear that the Commissioner's 1923 computation was made pursuant to Section 205 (a) of the Revenue Act of 1918 (R. 24–26, 66), whereas his 1929 computation was made pursuant to Section 226 (R. 49–50), and the Circuit Court of Appeals assumed that this fact explained the difference in the amount of the tax as found by the Commissioner upon the two computations. Because of this assumption, apparently, the court deemed it necessary, if the 1929 computation were to be accepted, to determine which section was applicable; it ruled that Section 226 was applicable.

and that under that section the tax as originally assessed, so far as the record disclosed, was correct. (R. 69.) But since the details of the 1929 computation are not available it can not be known whether the difference in the amount of tax upon the two computations resulted solely from the application of different methods of computation. Moreover, petitioner argues (Br. pp. 9–10) that computation under either Section 205 (a) or Section 226, if properly made, would produce the same tax. If this contention is sound, the Commissioner did not err in 1929 in applying Section 226, and with no evidence to the contrary it will be presumed that his computation was accurate.

Furthermore, we believe, as the court below held, that Section 226 was the applicable statute. Section 205 (a) (p. 38, *infra*) has reference only to a taxpayer who "makes return for a fiscal year beginning in 1917 and ending in 1918." This provision does not cover petitioner's case, since, contrary to the assertion in its brief, its original return for 1918 was only for the first six months of that year and not for the entire fiscal year ending June 30, 1918. (See footnote 11, p. 28, *supra*.) Section 226 provides:

> That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the

> following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year.

The last sentence above quoted seems clearly to apply to the present case. And while concededly the various regulations interpreting Sections 205 (a) and 226 are not altogether clear,[12] it has uniformly been held that Section 226 governs the computation of the tax where, as here, upon a shift from a calendar year basis to a fiscal year basis of return, a separate return is filed for the period between January 1, 1918, and the end of the fiscal year. *American Hide & Leather Co.* v. *United States,* 284 U. S. 343, 351; *Appeal of Henry D. Weed,* 2 B. T. A. 84; *Appeal of Coghlin Electric Co.,* 3 B. T. A. 1071.

Petitioner argues that even if the Commissioner properly applied Section 226, his computation of the tax was erroneous since, it is asserted, computation under that section, if done correctly, would produce the same amount of tax as computation under Section 205 (a). This contention is plainly wrong. Under Section 205 (a) the tax for that part of the fiscal year attributable to 1918 is found

[12] See Articles 25, 431, 1622, and 1624 of Treasury Regulations 45, issued under the Revenue Act of 1918, and Article 211 of Treasury Regulations 33 (Revised), issued under the Revenue Acts of 1916 and 1917.

by computing the income of the taxpayer for the entire fiscal year and the tax thereon under 1918 rates and taking the proportion of such tax which the portion of such fiscal year falling within 1918 is of the full fiscal year. See *Oglesby Coal Co.* v. *Commissioner,* 46 F. (2d 617 (C. C. A. 7th), certiorari denied, 284 U. S. 629. In cases falling under Section 226, p. 39, *infra*—

> the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included * * *.

This provision clearly contemplates "a separate return for such fractional portion of year entirely unrelated to any prior or future tax return."[13] *Appeal of Coghlin Electric Co., supra,* p. 1074. In view of the sharp difference in the methods of computation it would be only by accident that computation by either method would produce the same tax. (See R. 86–87.)

Petitioner argues that the "documentary evidence," i. e., the Commissioner's letter of May 7, 1923, the schedule of overassessment, etc., conclu-

[13] There is language in *American Hide & Leather Co.* v. *United States,* 284 U. S. 343, 351, which tends to support petitioner's view as to the method of computing the tax under Section 226, but we doubt the applicability of that language to the instant case in view of the fact that the precise problem here presented was not then before the Court.

sively shows that it overpaid its 1918 taxes.[14] This is but another way of stating petitioner's contention that the Commissioner did not have the right in 1929 to recompute the 1918 taxes. But as this Court pointed out in *Lewis* v. *Reynolds, supra* (p. 283):

> While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied.

Even if the present suit were based on an account stated the Government was free to impeach the account for mistake. See *United States* v. *Real Estate Savings Bank,* 104 U. S. 728, 733.

Moreover, it is questionable if petitioner is aided by his argument that the Commissioner was pre-

[14] Petitioner asserts (Br. pp. 4, 8) that counsel for the Government admitted in open court that the certificate of overassessment, the schedule of overassessment, and the schedule of refunds and credits were "valid documents," the inference of this assertion being that the Government admitted in open court that the computation of tax, as shown on such documents, was correct. The documents were, of course, "valid" in the sense that they were "official," and concededly they were duly prepared in the Bureau of Internal Revenue, but the record contains no admission by the Government that the computation of the tax shown on these documents was correct and unimpeachable. See footnote 5, p. 6, *supra.*

Petitioner also asserts (Br., pp. 8–9) that the District Court found as a fact that the Commissioner's determination of 1923 was correct and that petitioner had overpaid its 1918 taxes. No such finding appears in the record. It is true that the decision of the District Court proceeded upon the assumption that the 1918 taxes had been overpaid. (R. 56–59.)

cluded in 1929 from asserting that the 1918 tax was different in amount from the tax asserted in the 1923 certificate of overassessment. If the certificate finally fixed the tax liability it would seem that the action for taxes illegally collected had become merged in the account stated so that thereafter the taxpayer could sue only upon the account stated in an action against the United States. See *Parks & Woolson Machine Co.* v. *United States,* 58 F. (2d) 768, certiorari denied October 17, 1932, No. 279, present term, and footnote 7, p. 13, *supra.*

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any circuit [district] court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (U. S. C., Sup. VI, Title 28, Sec. 773.)

SEC. 700. When an issue of fact in any civil cause in a circuit [district] court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (U. S. C., Title 28, Sec. 875.)

SEC. 3226, as amended. *Suits for recovery of taxes wrongfully collected.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without

authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924." (U. S. C. App., Title 26, Sec. 156.)

SEC. 3228, as amended. *Claims for refundment; limitations.*—"(a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal

Revenue within four years next after the payment of such tax, penalty, or sum."

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. App., Title 26, Sec. 157.)

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1061, 1075—

SEC. 205 (a). That if a taxpayer makes return for a fiscal year beginning in 1917, and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of said period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. * * *

SEC. 212 (b). The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the

method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 264, 268—

SEC. 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the

Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1928, c. 852, 45 Stat. 791, 874:

SEC. 607. *Effect of expiration of period of limitation against United States.*

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Sup. VI, Title 26, Sec. 2607.)

SEC. 609. Erroneous Credits (a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

(U. S. C., Sup. VI, Title 26, Sec. 2609.)

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